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No. 83-1039

IN THE

Supreme Court of the United States

October Term, 1983

KINNETT DAIRIES, INC.,

Petitioner,

vs.

DAIRYMEN, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

REPLY BRIEF OF PETITIONER, KINNETT DAIRIES, INC.

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REPLY BRIEF OF PETITIONER, KINNETT DAIRIES, INC.

Petitioner Kinnett Dairies, Inc. ("Kinnett") in accordance with Rule 22.5 of the Supreme Court hereby submits its Reply Brief to the Opposition Brief ("Opp. Brief") of Respondent Dairymen, Inc. ("DI"). Kinnett submits its Reply Brief to address certain issues first raised by DI in its Opposition Brief and certain inaccuracies and misleading statements surrounding those issues.

Specifically, Kinnett is replying to DI's contentions (a) that Kinnett's Sherman Act Section 2 claims concerning DI's joint activities with other cooperatives were never raised before the district court below, (b) that it has been exonerated of all claims against it even when viewed as an ordinary business corporation, absent Capper-Volstead Act exemption, and (c) that the district court's evidentiary findings have remained uncontested by Kinnett.

Kinnett is not unmindful of Mr. Justice Holmes' admonition that "[w]e do not grant certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925). Nor does Kinnett propose to restate its position concerning the conflicting legal standards that have been used to evaluate DI's conduct by the courts below in this case and by the Sixth Circuit in *United States v. Dairymen, Inc.*, 1981-2 Trade Cas. ¶ 64,302 (6th Cir. 1981), *on remand*, 1983-2 Trade Cas. ¶ 65,651 (W.D. Ky. 1983). Kinnett believes that this issue is amply discussed in its Petition for Writ of Certiorari ("Plf. Pet.") and has been amplified by the National Independent Dairy-Foods Association in its brief filed *amicus curiae*. However, DI's position on the three subjects enumerated above is so greatly misleading that it requires a brief response.

ARGUMENT.

I.

KINNETT'S PETITION DOES PRESENT AN IMPORTANT ISSUE OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT.

A. Kinnett Has Always Claimed That DI's Joint Activities Were Section 2 Violations of the Sherman Act.

In arguing that Kinnett's Petition presents no important issue of Federal law, DI makes the astonishing assertion that Kinnett never alleged that its joint activities with other cooperatives were violations of Section 2 of the Sherman Act, 15 U.S.C. § 2 (as well as Section 1), and that Kinnett has created a "non-issue," or new issue, not raised before the courts until its appeal. (Opp. Brief at 11-12)

Kinnett's complaint clearly alleged DI's joint activities with other cooperatives to be violations of both Sections 1 and 2 of the Sherman Act, and Kinnett has maintained those Section 2 claims ever since. (*See Complaint*, attached hereto as Appendix A, ¶¶ 14, 15, 19e, 19f and 19g.)

The district court opinion in this case itself reflects Kinnett's claim that DI's joint activities were part of its Section 2 violation:

> The plaintiff charges that the defendant, acting alone *and in concert* with other milk producers, attempted to and did successfully restrain trade and commerce in and *monopolize* the supply of raw Grade A milk. The plaintiff complains that the defendant entered into a series of *anticompetitive arrangements with other cooperatives with the purpose and effect of obtaining or maintaining monopoly power* . . . .

512 F. Supp. at 611-12; Plf. Pet., App. B at 7 (emphasis added).

Moreover, as a preface to its discussion of DI's joint marketing activities with other cooperatives, the district court stated:

> In its most recent brief (Plaintiff's Reply to Defendant's Post Trial Brief) the *plaintiff contends* that the following listed incidents of *joint activity* by the defendant *evidence a scheme of cooperative monopolization* which includes predatory conduct and that such conduct is neither legitimate nor immune from suit.

512 F. Supp. at 614; Plf. Pet., App. B at 11 (emphasis added).

Thus, for DI to argue that Kinnett has created a non-issue, *i.e.*, an issue of monopoly by combination which Kinnett failed to raise below, is a gross distortion of the procedural history of this case. It not only flies in the face of the complaint and post trial briefings themselves, but in the face of the district court's understanding of the plaintiff's allegations as well.

B. If DI Were Viewed as an Ordinary Business Corporation, Its Arrangements With Other Cooperatives Would Constitute Per Se Violations of the Sherman Act.

DI in its Opposition Brief asserts that the district court dismissal of Kinnett's Sherman Act Section 2 claims can be supported by the independently sufficient reason that the district court found that Kinnett failed to prove the elements of a Section 2 case against DI as an ordinary business corporation. (Opp. Brief at 3, 6-9) Kinnett respectfully submits, and states bluntly, that such a finding is absurd on its face and plain error as a matter of law with respect to both DI's joint and unilateral cooperative activities. It is clear beyond the shadow of a doubt that if an ordinary business corporation had entered into the horizontal arrangements with

competitors as DI did with the cooperatives in the Georgia Super Pool, Great Lakes Southern Milk, Inc. ("GLSM"), the Associated Reserve Standby Pool ("ARSPC") or any of them, it would unquestionably have been found to have violated the Sherman Act *ipso facto* without any inquiry into its motives, intent or market power.[1] The district court itself found with respect to GLSM alone that:

> The stated goal of GLSM at its formation was to put an end to processors "playing one market or one co-operative against another" in order to bring down the raw milk prices. Its functions include: improving the prices of the dairy farmer members of the member cooperatives, attempting to assure that the prices in the various markets served by member cooperatives are in alignment, providing a forum for discussion of Class 1 prices and alignment, and making recommendations for Class 1 pricing and price alignments.

512 F. Supp. at 615; Plf. Pet., App. B at 13.

Thus the district court did not deny that the activities of which Kinnett complains took place. Rather, it chose to find them the legitimate marketing activities of Capper-Volstead cooperatives. (512 F. Supp. at 630-33; Plf. Pet., App. B at 46-51)

Furthermore, while DI denies that it did anything improper or illegal, it does not deny that its challenged activities with other cooperatives did occur much as Kinnett has described them. (*See* Plf. Pet. at 4-10 and facts cited therein.)

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[1]*See, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223-24 and n.59 (1940) (price tampering via control of supply through elimination of surplus); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 240-42 (1899) (market division via joint ventures); *United States v. Topco Associates, Inc.*, 405 U.S. 596, 612 (1972) (customer allocation via common purchasing agent); *United States v. Associated Press*, 326 U.S. 1, 11-13 (1945) (restrictive contracts).

Since DI did admittedly combine with other cooperatives to fix prices, allocate markets and control surpluses, there can be no denying that if DI is truly viewed as an ordinary business corporation, Kinnett has proven claims of a conspiracy to restrain and monopolize trade in violation of both Sections 1 and 2 of the Sherman Act.

Thus this Court is still left with the first question presented by Kinnett in its Petition, a question of federal law which is of crucial importance to independent dairy processors nationwide: Does the Capper-Volstead Act provide such absolute immunity from the Sherman Act that large regional cooperatives may band together in cartel fashion to fix prices, divide territories and customers, restrict supplies and artificially interdict the movement of a basic nutritional commodity like raw milk?

II.

THE DISTRICT COURT'S EVIDENTIARY FINDINGS IN THIS CASE HAVE BEEN TAINTED BY THE APPLICATION OF ERRONEOUS LEGAL STANDARDS.

DI repeatedly asserts that the district court's evidentiary findings in this case stand uncontested by Kinnett. This is simply wrong. Kinnett's contention is that the district court applied erroneous standards of law in reaching its findings and that if the district court was using the wrong yardstick, its measurements must be discarded; its factual findings are meaningless and irrelevant.

Given Kinnett's basic disagreement with the standards used in this case to determine a Capper-Volstead cooperative's liability under the antitrust laws, particularly with respect to the questions of predation and geographic submarkets, it is an extremely misleading and unfair statement of Kinnett's position to argue, as DI repeatedly does, that Kinnett does not contest the factual sufficiency of the finding that DI's complained-of activities "were not competition

stifling or predatory in any sense of the word." (512 F. Supp. at 638; Plf. Pet., App. B at 62; *see* Opp. Brief at 6-9)

The difference in the standard of predation[2] that has been applied to Kinnett's case and that enunciated by the Sixth Circuit in *United States v. Dairymen, Inc.*, 1981-2 Trade Cas. ¶ 64,302 (6th Cir. 1981), was discussed at length in Kinnett's Petition as were the different standards of evaluating relevant geographic markets used here and in *United States v. Dairymen, Inc., supra*, and in *United States v. Dairymen, Inc., on remand*, 1983-2 Trade Cas. ¶ 65,651 (W.D. Ky. 1983). The district court's evidentiary findings as they relate to market definition, market power and intent were all necessarily dictated by the legal standards the court used. They could not be otherwise. The fact that the District Court of Kentucky reached a contrary result on the same facts proves the point; under the proper legal standard, the facts are sufficient to support a finding that DI's conduct was anticompetitive. The factual findings here have all been tainted by the application of erroneous *standards* which are

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[2]DI misleads this Court when it asserts the district court was using the term "predatory" in a loose, nonpejorative sense. (*See* Opp. Brief at 8.) DI refers this Court to p. 631, n.31, of the district court opinion (*see* Plf. Pet., App. B at 47-48) but a careful reading of this footnote shows that the district court was merely exploring the different meanings of the word "predatory" at this point in its opinion, including definitions that could be called worse than pejorative. It is clear that the district court, in analyzing the character of DI's conduct, was guided solely by the now reversed district court opinion in *United States v. Dairymen, Inc.*, 1978-1 Trade Cas. ¶ 62,053 (W.D. Ky. 1978), and the Second Circuit in *Fairdale Farms, Inc. v. Yankee Milk, Inc., et al.*, 635 F.2d 137 (2d Cir. 1980) (*see* 512 F. Supp. at 635-37, 642-43; Plf. Pet., App. B at 55-59, 70-73).

in conflict with the *legal standards* used in other circuits and other district courts, and Kinnett properly seeks review of those standards by this Court.

DATED: February 15, 1984.

Respectfully submitted,

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APPENDIX A.

Complaint for Damages and Injunctive Relief. (Antitrust Laws — Jury Demanded)

United States District Court, Middle District of Georgia, Columbus Division.

Kinnett Dairies, Inc., Plaintiff, v. Dairymen, Inc., Defendant. No. 1701.

Filed: August 2, 1973.

The above-named plaintiff files this complaint against the above-named defendant and, demanding trial by jury, complains and alleges as follows:

COUNT ONE

I.

JURISDICTION AND VENUE

1. The complaint is filed and these proceedings are instituted against the above-named defendant under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26) and under Section 6 of the Agricultural Fair Practices Act of 1967 (7 U.S.C. 2305) to secure damages and injunctive relief from the above-named defendant for its violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2), Section 2 of the Clayton Act as amended by the Robinson-Patman Act (15 U.S.C. § 13), Section 3 of the Clayton Act (15 U.S.C. § 14), Section 4 of the Agricultural Fair Practices Act of 1967 (7 U.S.C. 2303) as hereinafter alleged, and the doctrine of pendent jurisdiction.

2. The defendant maintains an office, transacts business and may be found within the Middle District of Georgia. The interstate trade and commerce involved and affected by the alleged violations of the antitrust laws is carried on in part within the Middle District of Georgia.

II.
THE PARTIES

3. Plaintiff, KINNETT DAIRIES, INC., is a corporation organized and existing under the laws of the State of Georgia and maintains its principal place of business in Columbus, Georgia. Plaintiff is an independent processor, distributor and retailer of fresh milk and milk products.

4. Defendant DAIRYMEN, INC., is an agricultural cooperative marketing association, as defined in 7 U.S.C. § 291, incorporated and existing under the laws of the State of Kentucky with its principal office at Louisville, Kentucky. Dairymen, Inc., has a membership of approximately 9,500 milk producers located in the following states, among others: Alabama, Kentucky, Tennessee, Georgia, Mississippi, Louisiana, North Carolina, South Carolina, Virginia and Indiana. Dairymen, Inc., also owns and controls numerous large volume plants that process and distribute fluid milk and milk products. Dairymen, Inc., was formed in the latter part of 1968 as a combination of and successor in interest to various other cooperatives including, as of September 1, 1970, Georgia Milk Producers Cooperative. Any reference to defendant Dairymen, Inc., unless the context requires otherwise, is also a reference to previously existing corporations and entities that have been merged or consolidated into Dairymen, Inc.

III.
CO-CONSPIRATORS

5. Various corporations and individuals not made defendants herein, including but not limited to milk haulers and processors, have participated in the violations alleged and have performed acts and made statements in furtherance thereof.

IV.

DEFINITIONS

6. As used herein:

(a) "Milk" means the raw milk of cows suitable for utilization as fluid milk;

(b) "Fluid milk" means pasteurized milk sold by processors for human consumption in fluid form;

(c) "Producer" means a person engaged in the production of milk;

(d) "Independent producer" means a producer not a member of Dairymen, Inc.;

(e) "Processor" means a person, partnership or corporation engaged in the business of purchasing milk and processing, bottling and/or packaging and selling fluid milk and milk products;

(f) "Dairymen, Inc. marketing area" means the geographical area comprising the territory in which Dairymen, Inc. members produce milk, i.e., substantially all of Kentucky, Tennessee, Georgia, and Mississippi, and portions of Indiana, Louisiana, Alabama, North Carolina, South Carolina, Virginia, and West Virginia.

V.

NATURE OF TRADE AND COMMERCE

7. Substantial quantities of milk are produced and marketed in the Dairymen, Inc. marketing area by Dairymen, Inc. and by independent producers who compete with it in the sale of milk to processors for fluid utilization. Milk is transported by haulers from producers to processors, who require a constant supply of milk in order to carry on their business. In the production, transportation and marketing of milk by producers, haulers, and processors in the Dairymen, Inc. marketing area there is a continuous and substantial flow of trade and commerce among the states. In

1970 about 11 billion pounds of milk were marketed in the Dairymen, Inc. marketing area.

8. Processors pay for their purchases of milk according to its end use. Under Federal milk marketing orders, effective in many areas of Dairymen, Inc.'s marketing area, a market administrator sets a Class I price for milk used as fluid milk and a lower Class II price for milk utilized in manufacturing milk products. The blend price, which reflects total utilization in a market during the preceding month, is paid each month by processors to producers in the market. Producers who are members of an agricultural association are not paid directly by the processors but by the association, which collects from the processors. The amount paid to the association frequently includes a premium, which is added to the blend price. Market order regulations have allowed inclusion, for the purpose of computing the blend price, of milk produced outside the area, transported into it, and then diverted and processed outside the area. Importing Class II milk into a market reduces the blend price received by producers.

9. Dairymen, Inc. was formed in September, 1968, as a consolidation of eight associations of milk producers, each of which now forms the nucleus of a Dairymen, Inc. division. It operates through eleven divisions. Dairymen, Inc. has also acquired and operates manufacturing and processing facilities. When it was formed membership consisted of more than 7,000 producers shipping close to three billion pounds of milk annually. Many producers are members of Dairymen, Inc. as a result of membership in predecessor producer associations. Other milk producer associations have joined Dairymen, Inc. since its formation and the membership has risen to more than 9,000 farmers. In its second fiscal year, ending August 31, 1970, Dairymen, Inc. members marketed 3.6 billion pounds of milk for a total value

to members of approximately $223 million. In the fiscal year ending August 31, 1971, Dairymen, Inc. members marketed more than 5.0 billion pounds of milk for a total value of more than $351 million. In the fiscal year ending August 31, 1972, Dairymen, Inc. members marketed more than 5.0 billion pounds of milk for a total value of more than $390,899,235. A substantial quantity of this milk was sold and shipped to states other than the state in which it was produced.

10. In its marketing area Dairymen, Inc. is the dominant supplier; in some parts of its marketing area it controls more than 90% of the milk production. Most processors in this area, whose purchases of milk represent a substantial part of the market for milk producers, have no choice but to buy part of their requirements of milk from Dairymen, Inc.

11. In 1968 and 1969, Dairymen, Inc. supplied milk to processors under oral agreements on a weekly basis. In or about December 1969, Dairymen, Inc. notified its customers that it intended to require processors who wished to buy milk from it to execute full supply contracts. These contracts were not executed at that time. In or about the summer of 1971, Dairymen, Inc. again notified its customers that it intended to insist upon modified full supply contracts. It threatened to cut off the milk supplies of any processor who did not sign, and in fact did cut off the milk supplies of certain of these processors.

12. Milk must be transported from producers to the plants of processors. Most individual producers do not produce sufficient quantities of milk to make it economically feasible for them to transport their milk themselves and must rely on milk haulers to perform this service. Haulers having a substantial part of the milk hauling capacity in the Dairymen, Inc. marketing area have entered into contracts with Dairymen, Inc. for the transportation of the milk of Dairy-

men, Inc. members. These haulers have been instructed by Dairymen, Inc. not to transport the milk of independent producers.

13. Dairymen, Inc. is engaged in interstate commerce, and there is a continuous flow of milk in interstate commerce. During the period covered by this complaint, Dairymen, Inc. has sold and shipped substantial quantities of milk in states other than the states in which it was produced. Dairymen, Inc. also owns a number of plants in many states at which it processes milk and from which it sells and ships fluid milk and milk products across state lines.

VI.

VIOLATIONS ALLEGED

14. Beginning in or about 1968, the exact date being unknown to the plaintiff, and continuing up to and including the date of the filing of this complaint, defendant and the co-conspirators have engaged in a combination and conspiracy to unreasonably restrain and monopolize the above-described interstate trade and commerce in violation of Sections 1 and 2 of the Act of Congress of July 2, 1890, as amended (15 U.S.C. §§ 1 and 2), commonly known as the Sherman Act.

15. Beginning in or about 1968, the exact date being unknown to the plaintiff, and continuing up to and including the date of the filing of this complaint, defendant has attempted to monopolize the above-described interstate trade and commerce in violation of Section 2 of the Act of Congress of July 2, 1890, as amended (15 U.S.C. § 2), commonly known as the Sherman Act.

16. Beginning in or about 1968, the exact date being unknown to the plaintiff and continuing up to and including the date of the filing of this complaint, defendant has entered into contracts, agreements, and understandings in unrea-

sonable restraint of the above-described trade and commerce in violation of Section 1 of the Sherman Act, and the effects of which may be substantially to lessen competition or tend to create a monopoly in said trade and commerce in violation of Section 3 of the Clayton Act. The substantial terms of said contracts, agreements, and understandings are that processors including the plaintiff herein are required to purchase from defendant all or substantially all of their milk requirements.

18. Beginning in or about 1968, the exact date being unknown to plaintiff and continuing through the date of the filing of this complaint, defendant has coerced and discriminated and threatened to coerce and discriminate against milk producing farmers and plaintiff in violation of Section 4 of the Agricultural Fair Practices Act of 1967 (7 U.S.C. 2302).

19. In violating each of the foregoing statutes and with the specific intent to so do and to injure the plaintiff and eliminate plaintiff as a viable competitive entity, the defendant and co-conspirators have done the following things among others:

(a) Entering into the contracts, agreements, and understandings hereinbefore described in the preceding paragraphs;

(b) acquired and merged into Dairymen, Inc. the following processing dairies:

(1) Wells Dairies Cooperative, Columbus, Georgia;

(2) Irvindale - Miss Georgia Dairies, Atlanta, Georgia;

(3) South Georgia Dairy Cooperative (Dairy-Co), Quitman, Georgia;

(4) Kimball Dairy, Fitzgerald, Georgia;

(5) Thomasville Dairies, Thomasville, Georgia;

(6) Golden Glow, Inc., Albany, Georgia

thus giving to defendant a very substantial percentage of the milk processed and sold at wholesale in the State of

Georgia and affording to defendant processing plant outlets strategically located through the State;

(c) selling to plaintiff's customers outside the Columbus area at prices which were less than the defendant's cost to prevent plaintiff's successful expansion into Atlanta, Macon and Athens;

(d) arbitrarily selecting plaintiff as the only processor which could not itself haul milk from the Dairymen, Inc. producing farmers to its processing plant so as to deprive plaintiff of the profits normally associated with such hauling and to place it at a competitive disadvantage *vis-a-vis* its competitors, such as Golden Glow and Cherokee Farms, both of whom were permitted by defendant to continue to haul milk from Dairymen, Inc. producing members to their respective processing plants;

(e) entered into agreements with Atlanta Dairies, Better Maid Dairy Products, Inc., and Coweta Dairies to the effect that none of those dairies would sell any of their surplus milk to another processor without the consent of defendant Dairymen, Inc.;

(f) entered into agreements with Great Lakes-Southern Milk, Inc., a regional federation of cooperatives, to prevent the members of that federation from shipping milk into Georgia without Dairymen, Inc.'s consent, with full knowledge that plaintiff was securing milk from Tennessee producers at prices lower than the premium prices "imposed" on plaintiff and other Georgia processors by defendant;

(g) entered into agreements with Associated Standby Reserve Pool, a group of cooperatives, to prevent the members of that group from shipping milk into Georgia without the consent of defendant Dairymen, Inc.

(h) effectively precluding, by reason of the arrangements described with Atlanta Dairies, Coble Dairy Products

Cooperative, successor to Better Maid Dairy Products, Inc., Coweta Dairies, and Great Lakes-Southern Milk, Inc., plaintiff from access to milk at prices sufficiently low to permit it to bid competitively against defendant's processing plants for United States Government business, with the result that since 1970 defendant has substantially monopolized the United States Government bid business in Georgia available to it.

(i) by bringing in excess milk from North Carolina and Virginia and other points so as to prevent it from being sold to Georgia processors who would then be able to compete more effectively with defendant's processing plants;

(j) depressed the profits available through public schools in the Columbus area by lowering prices to unreasonably low levels particularly on chocolate milk since the time that product has been approved as part of the school milk program;

(k) by requiring Georgia based processors to buy milk from Dairymen, Inc. members at so-called "premium prices" which are imposed, without negotiation, by defendant so as to cover the exorbitant costs of operating Dairymen, Inc. in its unsuccessful effort to secure for its member farmers the prices established as fair, reasonable and compensatory by the Secretary of Agriculture under the aforementioned milk control orders;

(l) effecting agreements with other producers of milk that they will not furnish milk to processors who do not agree to take all or substantially all of their requirements of milk from defendant;

(m) preventing the delivery of milk by other producers to processors;

(n) requiring or attempting to require processors to take their full requirements, or substantially their full requirements of milk from the defendant and penalizing processors

failing or refusing to do so;

(o) requiring processors to contract for a set quantity of milk for a twelve-month period and penalizing processors failing or refusing to do so;

(p) manipulating the supply of milk by flooding the market in order to depress the price competing producers of defendant receive for their milk;

(q) restricting independent milk haulers from transporting the milk of independent producers;

(r) coercing and attempting to coerce producers to become and remain members under threat of loss of market; and

(s) entering into membership agreements which unreasonably restrict the right of members to withdraw and market their milk in competition with defendant.

20. The violations alleged in this complaint are continuing and will continue unless the relief hereinafter prayed for is granted.

VII.
EFFECTS

21. The violations in the complaint have had, or will have, the following effects, among others:

(a) processors who have signed supply contracts have been limited in their ability to choose between defendant and competing independent producers as sources of supply;

(b) processors who have refused to sign the aforesaid contracts either have been refused their usual purchases of milk or have been threatened by Dairymen, Inc. with a refusal to supply their requirements;

(c) independent producers have been and will be foreclosed from selling to processors whose purchases represent a substantial share of the market;

(d) independent producers have been and may be compelled to join defendant because of a decreasing number of outlets for their milk or because of inability to have their milk transported to market;

(e) members of defendant have been and may be prevented from withdrawing from membership and competing with defendant;

(f) the number of sources of supply to which processors may turn for their milk has been reduced and will be further reduced;

(g) independent producers have been and may be foreclosed from dealing with milk haulers who sign exclusive agreements with defendant;

(h) milk haulers have been and may be foreclosed from dealings with independent producers;

(i) competition among the defendant and other producers and cooperatives in the sale of milk and milk products has been restrained and eliminated;

(j) competition among the defendant and other processors and cooperatives in the sale of milk and milk products has been restrained and eliminated;

(k) sale of milk in the Dairymen, Inc. marketing area has been monopolized;

(l) producers have been denied unrestricted access to milk haulers;

(m) producers have been denied the unrestricted opportunity to sell milk to processors;

(n) plaintiff and other processors and haulers have been deprived of the benefit of free and open competition among producers; and

(o) plaintiff and other purchasers have been deprived of the opportunity to buy fluid milk and milk products in an unrestricted market and at competitive prices.

VIII.

INJURY TO PLAINTIFF

22. As a direct and proximate result of the violations of law recited herein and as intended by defendant, plaintiff has sustained damage in that:

(a) it has lost profits it would otherwise have made;

(b) it has sustained operating losses it would otherwise have avoided;

(c) it has lost substantial goodwill normally attached to a profitable enterprise; and

(d) it has lost a substantial part of the investment made in the expansion of its business.

Plaintiff cannot now measure these damages with sufficient specifity [sic] to allege the dollar amount thereof, but estimates such damages to be in the approximate amount of $1,675,000, before trebling. When plaintiff has sufficient information to permit it to allege, with specifity [sic], the quantum of its damages, plaintiff will ask leave of Court to amend its complaint to insert said sum herein.

IX.

PRAYER

WHEREFORE, the plaintiff prays:

1. That the Court adjudge and decree that the defendant Dairymen, Inc. has engaged in combinations and conspiracies and unlawful price discrimination to unreasonably restrain and monopolize, and has unlawfully attempted to monopolize the aforesaid trade and commerce in violation of both Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2); Section 2 of the Clayton Act as amended by the Robinson-Patman Act (15 U.S.C. § 13); and Section 3 of the Clayton Act (15 U.S.C. § 14).

2. That the Court adjudge and decree that the defendant Dairymen, Inc. violated Section 4 of the Agricultural Fair

Practices Act of 1967 (7 U.S.C. 2303);

3. That the defendant Dairymen, Inc., its successors, assignees, transferees, officers, directors, members, agents and employees and all persons acting or claiming to act on behalf thereof be permanently enjoined and restrained from:

(a) directly or indirectly, continuing, maintaining or renewing the unlawful combinations, conspiracies, price discriminations, and attempt to monopolize alleged in this complaint, or from engaging in any other combination or conspiracy having a similar purpose or effect, or from adopting or following any practice, plan, program or device having a similar purpose or effect;

(b) from discriminating or threatening to discriminate against the plaintiff in its purchases of milk, including but not limited to charging the plaintiff higher prices for milk produced by members of Dairymen, Inc. than that paid by plants of Dairymen, Inc. for milk produced by members of Dairymen, Inc.;

(c) from refusing to allow the plaintiff to haul milk from producers' farms who are members of Dairymen, Inc.;

(d) inducing, or attempting to induce the plaintiff to enter into any agreement, contract or understanding for the sale of milk;

(1) which requires, as a condition of such sale, that plaintiff purchase all or substantially all of its milk supply requirements from the defendant, or

(2) which limits or attempts to limit, in any manner, the sources of supply of milk from which the plaintiff may purchase, or

(3) which charges the plaintiff a higher price for the purchase of milk if he does not purchase his complete milk supply from defendant, or if he purchases milk from any supplier not a member of defendant;

(e) refusing to sell, or threatening to refuse to sell, to plaintiff any quantity of milk on the grounds that the plaintiff has not entered into any form of exclusive dealing arrangement with defendant;

(f) enforcing, or attempting to enforce any form of exclusive dealing arrangement with a milk processor; and

(g) giving preference, or continuing to give preference in the sale of milk to any milk processor who has previously entered into any form of exclusive dealing arrangement over any milk processor who has not entered into any such arrangement;

4. That plaintiff recover treble the amount of its damages by reason of the antitrust violations alleged herein, along with a reasonable attorney's fee and costs of suit;

5. For such other and further relief as to the Court may seem just and proper in the circumstances.

COUNT TWO

23. The Court has jurisdiction of the claim and cause of action set out in this Count Two under the doctrine of pendant jurisdiction because it is ancillary to the antitrust claims set out in Count One above and arises from the same transactions, circumstances and nucleus of operative fact as said antitrust claims.

24. Plaintiff hereby incorporates in this Count Two by reference the provisions of Paragraphs No. 1, 2, 3, 4, 9, 10, 11 and 13 of Count One above.

25. On or about January 12, 1972, plaintiff and defendant entered into and executed a certain Sales Agreement, which was later amended by agreement of the parties, a copy of which Sales Agreement, as amended, is hereto attached, marked Exhibit "A", and incorporated herein by reference. Said Agreement was extended by the parties for a period ending September 30, 1973. Said Exhibit "A"

was prepared by the defendant and the terms and provisions thereof were not negotiable.

26. Plaintiff has fully and faithfully performed all of its obligations under said Sales Agreement, as amended. During the period since January 12, 1972, plaintiff has been dependent upon and has relied upon defendant to supply milk pursuant to said Agreement. Approximately 60 per cent of plaintiff's milk supply has been furnished to it by defendant.

27. If defendant does not comply with its obligations and commitments under said Agreement, plaintiff will be unable to supply milk to its regular customers and defendant, through its various processors who compete with plaintiff, will fill the vacuum and will take plaintiff's customers away from plaintiff, thereby destroying plaintiff's milk business.

28. On or about June 5, 1973, defendant notified plaintiff of its intention unilaterally to increase the price of milk supplied by it to plaintiff, and proposed to plaintiff the execution of a certain supplemental agreement, copies of which notice and supplemental agreement are hereto attached, marked respectively Exhibits "B" and "C", and incorporated herein by reference as fully as if the same were set forth herein. Plaintiff refused to abrogate the said Sales Agreement, as amended, Exhibit "A", or to pay the unilateral price increase demanded by defendant.

On or about July 12, 1973, defendant notified plaintiff of its intention unilaterally to increase the price of milk supplied by it to plaintiff and proposed to plaintiff the execution of a certain supplemental agreement, copies of which notice and supplemental agreement are hereto attached, marked respectively Exhibits "D" and "E", and incorporated herein by reference as fully as if the same were set forth herein. Plaintiff refused to abrogate the said Sales

Agreement, as amended, Exhibit "A", or to pay the unilateral price increase demanded by defendant.

On August 1, 1973, two months prior to the termination of the Sales Agreement, as amended, Exhibit "A", defendant failed and refused to deliver milk to plaintiff as required by said Sales Agreement, as amended, unless plaintiff paid said proposed increased price and insisted upon plaintiff signing a waiver of its contract rights, a copy of said waiver being hereto attached, marked Exhibit "F", and incorporated herein by reference.

Plaintiff insisted upon its rights under said Sales Agreement, as amended, whereupon defendant failed and refused to deliver to plaintiff milk then due under said Agreement, and thereby committed a material breach thereof.

29. On information and belief, plaintiff alleges that defendant will continue to breach said Sales Agreement, as amended, and will fail and refuse to deliver milk to plaintiff under said Agreement in accordance with the terms thereof.

30. So long as defendant continues to breach said Sales Agreement, as amended, plaintiff will be damaged thereby, but plaintiff is not presently able to quantify the amount, nature and extent of such damages. However, plaintiff alleges that its milk business, which defendant seeks to destroy, has a fair market value in excess of $1,000,000.00. As defendant well knows, plaintiff has numerious contracts with its customers to supply them milk. Plaintiff will be unable to obtain the milk necessary to supply its customers and to perform said customer contracts unless defendant carries out its aforesaid contractual obligations to plaintiff.

31. Plaintiff is being and will be immediately and irreparably damaged by defendant's continuing breaches of said Sales Agreement, as amended.

32. Plaintiff has no adequate remedy at law.

33. In the matters herein set forth, defendant has acted in bad faith; its breach of said Sales Agreement, as amended, has been arbitrary, capricious and without basis or foundation; it has been litigious; and it has put plaintiff to unnecessary trouble and expense. The conduct of defendant, as herein described, has been willful and it constitutes duress, extortion, and coercion. The purpose of defendant's said willful and illegal acts is to destroy plaintiff's business, to take over plaintiff's customers, and to monopolize the milk business in the State of Georgia.

WHEREFORE, plaintiff prays:

(1) That defendant, its officers, directors, employees, servants, agents, members, haulers, subsidiary corporations, independent contractors, successors, assigns, transferees, and all parties acting for, by, through or in concert with them, or any of them, be immediately restrained and temporarily and permanently enjoined from:

(a) Breaching said sales agreement as amended in any manner or respect whatever at any time prior to October 1, 1973;

(b) charging, demanding from or accepting in payment more than $8.28 per hundredweight for milk testing 3.5% butterfat used in Class I for milk furnished or delivered by defendant to plaintiff under said sales agreement as amended;

(c) delivering, at any time prior to October 1, 1973, any less or different quantities of milk to plaintiff, or at different times or places, than the quantities and at the times and places specified in or pursuant to the express terms of said sales agreement as amended.

(2) That plaintiff do have and recover from defendant damages in the amount of $1,000,000;

(3) that plaintiff do have and recover from defendant its expenses of litigation, including without limitation at-

torneys' fees in the amount of $25,000;

(4) that the issues raised in this Count Two be tried by jury at the September, 1973 Term of this Court;

(5) for such other and further relief as to the Court may appear mete and proper.

DATED:

HATCHER, STUBBS, LAND, HOLLIS & ROTHSCHILD
ALBERT W. STUBBS
BLECHER, COLLINS & HOECKER
MAXWELL M. BLECHER
HAROLD R. COLLINS, JR.
ROBERT COCHRAN
By /s/ Albert W. Stubbs
Attorneys for Plaintiff

EXHIBIT "A".

SALES AGREEMENT

THIS AGREEMENT made in the City of Decatur, State of Georgia, on the 12th day of January, 72 by and between DAIRYMEN, INC., a cooperative corporation organized and existing under the laws of the State of Kentucky, with its principal office and place of business at 3941 Buechel Bank Road, Louisville, Jefferson County, Kentucky (hereinafter called "Seller") and the KINNETT DAIRIES, INC., of Columbus City, State of Georgia, with its principal office and place of business located at Sixth Avenue, Columbus, Muscogee County, Georgia (hereinafter called "Buyer"),

WITNESSETH:

WHEREAS, the Buyer is engaged in the distribution of milk and milk products at the wholesale, retail, or consumer level; and

WHEREAS, the parties are desirous of establishing arrangements whereby the Buyer will purchase raw milk from the Seller, and

WHEREAS, the Seller is the marketing and bargaining agent for its various dairy farmer members and will supply Buyer with raw milk on the terms hereinafter stated to the end that the stability and standards of the fluid milk business and permanent relations by and between the parties hereto may be established and maintained; and

WHEREAS, it is to the mutual advantage of Seller and Buyer to have a clear understanding of the terms of trade clearly set forth prior to doing business,

NOW, THEREFORE, in consideration of the premises and the mutual covenants herein contained, the parties hereto agree mutually with the other, as follows:

1. *Volume of Milk to be Sold and Purchased*

(a) Beginning on the effective date of this Agreement, and continuing through the term hereof, Seller shall sell to Buyer, and Buyer shall purchase from Seller not less than *28,313,000* pounds of Grade A milk for Buyer's milk plant. The total quantity of milk ordered for each calendar month of the term hereof shall be not less than the quantity indicated for each month as shown in Exhibit A attached hereto.

During any month in which Buyer's milk needs for processing at Buyer's plant is less than the amount shown on Exhibit A for the month, the Buyer shall reduce purchases from Seller in the same proportion as other sources of producer milk. The terms "producer milk" as used in this Agreement shall have the meaning as presently defined in Federal Market Order No. 7. The Buyer agrees to authorize the Market Administrator of Federal Order No. 7 to furnish information to Seller to verify a pro rata reduction of purchases. During any month that the reduction in purchases from Seller and from other sources are not substantially pro rata, then the charges as set in paragraph 4 and Exhibit C shall apply.

Insofar as possible raw milk for Buyer shall be milk of member producers located in the counties listed in Exhibit B attached hereto and made a part hereof.

(b) Buyer shall have the option of receiving said milk from Seller on the basis of 4, 5, 6, or 7 days per week. Buyer shall inform Seller on Friday of requirements and deliveries scheduled for the following week. Volume adjustments in weekly orders may be made on forty-eight (48) hours' notice.

(c) To the fullest extent possible, Seller shall deliver milk directly to Buyer's plant in bulk tankers, directly from assigned producer farms, using the sum of each farmer's

weight, determined by the reading of the measuring stick in each farmer's bulk tank to determine the total weight of milk in each tank load. However, when it is necessary that milk be delivered by Seller from one of its plants wherever located (hereinafter referred to as "Seller's plant") to Buyer's milk plant, weights will be determined by the Seller.

The Buyer shall have the right to check weights of loads of milk, at his expense, and whenever differences in the weights determined by the Seller differ from those obtained by the Buyer, by more than 0.5 percent, the Buyer shall inform Seller immediately of such differences. Seller shall take action promptly to bring the delivery weights of milk within the allowable tolerance.

2. *Delivery and Hauling Risk:* Delivery shall not be deemed to have been made to Buyer's milk plant until hose is connected to the tanker and the valve has been opened. All risks relative to product prior to such delivery shall be those of the Seller.

It is understood that the Seller will direct the delivery of milk to the Buyer's plant daily at the very earliest time within reason and in as few truck loads or tank loads as are expedient and as existing conditions will permit; and all arrangements and contracts with haulers and truckmen for the pickup, weighing and sampling of milk at the farm and the transportation thereof to the Buyer's plant shall be made, negotiated, arbitrated, and/or determined by the Seller.

3. *Prices, Service Charges, and Payment:*

(a) The price of milk delivered shall be as hereinafter set out, to wit:

(i) The price of Class I milk shall be in accordance with the Seller's pricing program currently in effect, a copy of which is attached hereto and made a part thereof and marked Exhibit D, and applicable to milk sold to

handlers fully regulated under Federal Milk Marketing Order No. 7; provided, however, that in the event the Minnesota-Wisconsin Price Series as announced by the U. S. Department of Agriculture reaches the level of $4.92 per cwt. for 3.5% milk, then there shall be an increase of 13 cents per cwt. on the prevailing Class I price, effective on the first day of the following month; then for each 15 cents per cwt. increase or decrease above or below the level of $4.92 in the said Minnesota-Wisconsin Price Series for milk containing 3.5% butterfat, the prevailing Class I price shall be adjusted as follows:

MINNESOTA-WISCONSIN PRICE SERIES BRACKETS	ADJUSTMENT OF PREVAILING CLASS I PRICE	RESULTING CLASS I PRICE
$4.92 but less than $5.07	+ 0 cents	$7.53
5.07 but less than 5.22	+ 15	7.68
5.22 but less than 5.37	+ 30	7.83
and etc. and		
$4.92 but more than $4.77	− 0 cents	$7.53
4.77 but more than 4.62	− 15	7.38
4.62 but more than 4.47	− 30	7.23

In case the basic formula price for figuring Federal Order prices is subsequently changed to other than the Minnesota-Wisconsin Series, then the aforesaid method of adjusting the price shall be re-negotiated.

(ii) The price for milk other than that used for Class I shall be the applicable Federal Order price. In the event the average price paid for manufacturing milk in the Minnesota-Wisconsin area as announced by the U. S. Department of Agriculture reaches or exceeds the level of $4.92 per cwt., the price for milk utilized in Classes other than Class I shall be the applicable Federal Order price plus 8 cents per cwt. Such 8 cents per cwt. shall apply only to milk utilized at Buyer's plant. Should the Federal Order Number 7 classifica-

tion of milk products be changed during the term of this contract to provide for allocation of products now classified in Class I and Class II to a reallocation of classification to three Classes, this sales agreement shall be reopened for purposes of negotiating the price of milk allocated in Classes other than Class I.

If, after the reclassification to three Classes, the Class II price is established at 15 cents per cwt. above the Minnesota-Wisconsin Price Series, or higher, the 8 cents above the Minnesota-Wisconsin Series shall not apply to products classified as Class II. If the U. S. Department of Agriculture should determine that formulas other than the Minnesota-Wisconsin Price Series is established as a basis for pricing, then this contract may be reopened by either party.

(iii) *Butterfat Differentials:* The foregoing Class prices shall be subject to the applicable butterfat differential under the applicable Federal Milk Marketing Order for the period herein involved.

(iv) *Location Adjustments:* The foregoing Class prices shall also be subject to the applicable location adjustments as determined under the applicable Federal Marketing Order for the period herein involved.

(v) *Armed Service Contracts:* The Class I price for milk used to fulfill United States Armed Service contracts shall be quoted and confirmed in writing by Seller at request of Buyer. This price for milk delivered for use to fulfill such United States Armed Service contract shall not be changed during the term of such United States Armed Service contract.

(b) *Services Rendered by Seller:* Specifically, the Seller shall render the following services:

(i) Non-brand advertising of milk and other dairy products, promotion, education, and research for an on behalf of the milk industry.

(ii) Supplying quantities of milk as per weekly schedule of orders from Buyer.

(iii) Disposing of any surplus above quantities needed by Buyer for plant use.

(iv) Providing field services necessary to insure a quality product.

(v) Assure that all milk delivered to Buyer meets all applicable Quality Standards in effect in area where Buyer makes sales of packaged milk.

(vi) Responsibility for, direction of, and assignment of member-producers to all farm pickup haulers assigned to deliver milk to Buyer's plant.

(vii) Laboratory services on individual member-producers and all farm pickup tankers of milk assigned as supply to Buyer's plant.

(viii) Determination of butterfat test on each individual producer-member of Seller assigned to the Buyer's plant.

(ix) Preparation of individual producer payroll checks and payment of individual producer for milk delivered to Buyer's plant.

(c) *Receiving Schedule Charge*: This provision becomes effective on the date this Agreement is signed. If the Buyer receives milk only four (4) days or less per week, the Buyer shall pay to the Seller an additional charge of 8 cents per cwt. on all milk received at Buyer's milk plant from Seller; if the Buyer receives milk only five (5) days per week, then the Buyer shall pay to the Seller an additional charge of 5 cents per cwt. on all such milk. For the purpose of this paragraph, the number of days of receipt shall exclude those days on which the daily receipts from Seller are more than 30% below the average daily receipts for the week. (In computing the percentage, any volume of milk ordered by Buyer but not delivered by Seller on the day specified shall be treated as a receipt.) If Buyer purchases 95% or

more of his total supply from Seller, then the above charge on 5-day delivery shall not apply.

(d) *Payment*: Buyer shall remit payments to Seller pursuant to this Agreement at the times and dates as specified in the applicable Federal Milk Marketing Order.

(e) *Modifications*: Any modifications or exceptions in, or additions to, this Agreement shall be made in writing and agreed to by the parties hereto.

4. *Price Cost Equalization Charge*: Seller shall dispose of all quantities of its surplus milk not needed by the Buyer for his plant. For this service, Buyer shall pay Seller a basic cost equalization charge, as set forth in Exhibit C hereto, in the event the quantities of milk that are reduced in purchases from Seller and from other sources are not substantially pro rata as provided in paragraph 1(a) of this Agreement. This cost equalization charge is to be paid monthly and is to be calculated according to EXHIBIT C attached hereto.

5. *Quality Standards*: Seller warrants that all milk delivered to Buyer's milk plant shall meet the Grade A requirements of the United States Public Health Service, the State Health Department, the applicable City Health Department, and other similar regulatory bodies in states where milk is produced and sold; and shall conform to the applicable Federal Food, Drug, and Cosmetic Act and laws and regulations.

The Seller agrees to work with the Buyer to develop milk of a quality for the Buyer's use consistent with the buyer's quality program since such program is believed to be one that would be beneficial in improving shelf life of finished products and should contribute to more sales of milk and dairy products.

6. *Emergency Supply*: It is understood that in case of a short supply of milk, the Seller agrees to pro rate the production of its members in the particular marketing area on the basis of the requirements for Class I sales with each and every regular buyer of milk as near as is possible to do so, and, in case of being unable to supply milk from locally produced sources, it will be the duty of the Seller to import milk of its members from other areas, or from other sources.

7. *Other Emergencies*: In the event either party is prevented or delayed from making the aforementioned deliveries or performing any other duty required by this Agreement due to fire, strike, drought, acts of God, epidemics or disease, orders, rules or regulations or acts of government relating to national defense or prosecution of war, lack of manpower due to war conditions, or other causes beyond the control of either, that party shall not be liable for damages resulting therefrom.

8. *Favored Nation Clause*: Seller represents that the terms and conditions, including price, of this Agreement are comparable to the terms and conditions offered to other purchasers competing in the same Federal or State Marketing Order regulating Buyer's plant covered by this Agreement; and Seller agrees that in the event any such other purchaser (including a member, subsidiary, or affiliate of Seller's cooperative association) is at any time offered terms and conditions different than those offered the Buyer hereunder, then Seller shall offer Buyer such terms and conditions, it being the intent of this section to assure the Buyer the most favorable terms and conditions which Seller at any time is selling milk to other purchasers in the Federal or State Order in which Buyer's plant covered by this Agreement is regulated.

9. *Term of Agreement*: This Agreement shall become effective on October 1, 1971, and shall continue for one

year and shall be extended from year-to-year for successive years, until either party shall have given notice in writing of its intention not to renew not more than seventy-five (75) days or less than sixty (60) days prior to any anniversary date hereof.

10. *Binding Effective of Agreement*: This Agreement is not binding until it is signed by a duly authorized official of Buyer and approved and accepted by a duly authorized official of Seller and duplicate originals of the same delivered to each other.

DAIRYMEN, INC.

BY Frank H. McDowell
Assistant Secretary

/s/ W. J. Smith Jr.
WITNESS

/s/ Kinnett Dairies Inc.
BUYER'S NAME

BY John R. Kinnett, Jr.
Pres.

/s/ (illegible)
WITNESS

ADDENDUM NO. 1
TO SALES AGREEMENT
KINNETT DAIRIES, INC.

Notwithstanding anything herein contained to the contrary, during a period of a price freeze or price control imposed by the United States Government, including, but without limitation, the present price control under Executive Order 11627, as supplemented or amended by subsequent Executive Orders, regulations, interpretations and the like, it is agreed that Class I milk price hereunder shall not increase except to the extent that Buyer increases its prices on Class I finished products pursuant to price commission approval (or approval of any other duly authorized agency) based upon the proposed increase of such Class I price.

ADDENDUM NO. 2
TO SALES AGREEMENT
KINNETT DAIRIES, INC.

Notwithstanding the provisions of paragraph 1(c) with respect to the Seller using farm weights of the milk delivered, the present program of the Seller marketing milk to Buyer pursuant to Section 13(d) of Georgia Order No. 7 will be continued so long as this program is satisfactory to both Buyer and Seller.

EXHIBIT A

KINNETT DAIRIES, INC.

SCHEDULE OF MONTHLY QUANTITIES

(in thousands of pounds)

	MONTH	CIVILIAN	MILITARY	SUB TOTAL	ADDED VOLUME	TOTAL
1.	Oct	1,409	1,565	2,974		2,974
	Nov	1,350	1,550	2,900		2,900
	Dec	899	1,550	2,449	900	3,349
2	Jan	1,087	1,550	2,637	700	3,337
	Feb	773	880	1,653	675	2,328
	Mar	826	950	1,776	700	2,476
	Apr	915	950	1,865	675	2,540
	May	682	900	1,582	700	2,282
	June	545		545	675	1,220
	Jul	706		706	700	1,406
	Aug	926		926	700	1,626
	Sep	1,200		1,200	675	1,875
		11,318	9,895	21,213	7,100	28,313

In the event Buyer's Class I fluid sales should decrease as much as five percent (5%) from such sales volume in January, 1972 (exclusive of possible adjustments already considered, then an appropriate reduction shall be made in the monthly volumes above.

EXHIBIT B

MEMBERS ASSIGNED TO KINNETT DAIRIES, INC.

Roy Butts, Route 2, Pine Mountain, Georgia 31822
Robert C. Hamer, Route 2, Pine Mountain, Georgia 31822
Charles W. Hunt, Route 2, LaGrange, Georgia 30240
Jeff-Co Dairy of Georgia, Inc., Box 237, Richland, Georgia 31825
John K. Murphy, Route 2, Pine Mountain, Georgia 31822
Raymond A. Ramsey, Rt. 4, Box 262, Phenix City, Alabama 36867
Vernon Sanders Dairy #1, Forsyth, Georgia 31029
E. J. Satterfield, Route 1, Americus, Georgia 31709
Clyde P. Smith, Route 1, Andersonville, Georgia 31711
St. John Dairy, Route 2, Ellaville, Georgia 31806

EXHIBIT C

KINNETT DAIRIES, INC.

BUYER COST EQUALIZATION CHARGE

1. Multiply the volume of milk not physically received (the difference between quantity shown in Exhibit A for the month and milk physically received) by the Buyer's percentage of producer milk utilized in Class I;
2. Multiply the results obtained in 1 above by a factor obtained by subtracting the percent of producer milk normally received from D.I. from 100%;
3. Multiply the results obtained in 2 above by the difference in the D.I. Class I price and the Federal Order No. 7 minimum Class I price, but not less than 30 cents per hundredweight.

EXHIBIT D

August 14, 1970

Mr. John R. Kinnett, Jr., President
KINNETT DAIRIES, INC.
P. O. Box 357
Sixth Avenue
Columbus, Georgia 31906

Re: Price Announcement

Dear Mr. Kinnett:

This notice is given pursuant to authority and direction of the Board of Directors of Georgia Milk Producers Cooperative Association, Inc. to all pool handlers regulated under Order No. 7 who are receiving milk delivered from the farms of our members. This is to advise you that, effective as of September 1, 1970, and to continue until further notice, subject to change only by notification in writing to you, the Class I price of milk received directly from our members regularly assigned to you shall be:

1. (a) Plant Location, Northern Zone — Georgia Marketing Area — $7.25 per cwt.

   (b) Plant Location, Southern Zone — Georgia Marketing Area — $7.40 per cwt.

   Subject to the Class I butterfat differential as determined under Federal Milk Marketing Order No. 7 for the period herein involved, or

2. The Federal Order Class I price (pursuant to Section 51 (a) of Order No. 7) as announced by the Market Administrator, whichever is the higher, for 3.5 percent butterfat content with a butterfat differential for milk testing above or below 3.5 percent at the same rate as is provided in Section 52 (a) of Order No. 7

For the purpose of determining the percentage and volume of milk receipts from our members which is subject to the

foregoing Class I pricing arrangement, the milk received from the members of our Association shall be treated on a pro rata basis of your total producer milk received during the month.

Milk which is used in fulfillment of a military contract which was entered into prior to the date of receipt of this letter will continue to be priced upon the same basis as it is now priced, but all milk which is used in the fulfillment of military contracts which are entered into with the Federal Government or any of its instrumentalities after the date of the receipt of this letter will be priced upon the same basis as other milk and in accordance with the first paragraph of this letter.

The acceptance of the milk deliveries of our members on and after September 1, 1970, shall be deemed to have been received by you and subject to, and in accordance with the above quoted price for which payment is to be made at the same time and in the same manner as payments would otherwise be required to be made under the provisions of Federal Milk Order No. 7. If any revisions are to be made in the sale of our members product, you will be advised of any such revisions in writing. Otherwise, the price arrangement hereunder is to remain in full force and effect.

Very truly yours,
GEORGIA MILK PRODUCERS
COOPERATIVE ASSOCIATION, INC.

_____
President

_____
General Manager

[Letterhead]

GEORGIA DIVISION
Dairymen, Inc. PHONE (404) 482-7406
LOCATION: 6400 HILLANDALE ROAD, LITHONIA
MAILING ADDRESS: P.O. BOX 1287, DECATUR, GEORGIA 30031

November 11, 1972

Mr. John R. Kinnett, Jr. President
Kinnett Dairies, Inc.
P.O. Box 351
Columbus, Georgia 31902

Dear John:

The Sales Agreement dated January 12, 1972 between Kinnett Dairies, Inc. and Dairymen, Inc. is amended with respect to the schedule of monthly quantities of milk to be supplied by Dairymen Inc., exclusive of milk for military purposes, as follows:

	Period	Quantity (000 lbs.)
1972	Oct.	3,150
	Nov.	2,630
	Dec.	2,620
1973	Jan.	2,775
	Feb.	2,460
	Mar.	2,740
	Apr.	2,510
	May	3,000
	June	2,980
	July	3,060
	Aug.	3,100
	Sept.	3,420
	TOTAL:	34,445

Milk currently supplied for military purposes is set out in a separate document, and quantities for future contracts will be agreed upon prior to the contract period.

Very truly yours,

DAIRYMEN, INC.

/s/ Frank H. McDowell
Frank H. McDowell, Manager
Georgia Division

Accepted:

/s/ John R. Kinnett, Jr.
John R. Kinnett, Jr.

EXHIBIT "B".

[Letterhead]

Dairymen, Inc.
GEORGIA DIVISION
PHONE (404) 482-7406
LOCATION: 6400 HILLANDALE ROAD, LITHONIA
MAILING ADDRESS: P.O. BOX 1287, DECATUR, GEORGIA 30031

June 5, 1973

Mr. John R. Kinnett, Jr., President
Kinnett Dairies, Inc.
P. O. Box 357
Columbus, Ga. 31906

Dear Mr. Kinnett:

Within the past two weeks we have discussed with you or your representative, the necessity of amending the Sales Agreement between Dairymen, Inc., and your company. In order to remain competitive in the procurement of milk supplies and to assure you and our other customers of an adequate supply of milk, it is necessary to amend the Class I pricing provisions of our Agreement with you effective July 1, 1973.

Our dairy farmer members are caught in a severe cost-price squeeze with the ever increasing costs of labor, farm machinery, and equipment, supplies, services, taxes, insurance, and especially, feed costs, which have more than doubled in price from a year ago. (The enclosed information emphasizes this drastic situation.) This cost-price squeeze has caused over 1.0% of our dairy farmer members to sell out of business in March of this year and over 1.1% to quit in April of this year. Milk production has declined and is continuing to decline, both nationally and in the Southeast. At the same time, sales of milk and dairy products continue to expand.

Because of the above factors and in order to assure an adequate supply of milk, and to give you as much advance notice as possible, this letter confirms our earlier discussions with you about a price increase effective July 1, 1973, to the effect that the price of milk received from Dairymen, Inc., members on and after that date will be $8.71 (including handling charge) per hundredweight for 3.5% butterfat milk utilized in Class I per Federal Milk Marketing Order No. 7, which regulates the handling of milk in the Georgia marketing area. However, in no event shall the price for Class I milk be less than the applicable Federal Order Class I price. All other provisions of the Sales Agreement heretofore executed between your company and Dairymen, Inc., will remain in effect through September 30, 1973.

Enclosed please find a copy of the Supplemental Agreement which confirms our discussions about this price increase. We will discuss this matter further with you and arrange to receive an executed copy of this Supplemental Agreement.

We appreciate you cooperation in helping to ameliorate a significant problem facing the entire dairy industry. Maintaining the basic productive capacity of the dairy industry is necessary for a progressive and viable industry, now more than ever, and especially in the future.

Very truly yours,

DAIRYMEN, INC., GEORGIA DIVISION

/s/ Frank H. McDowell

Frank H. McDowell

Manager

FHMcD:ab

Enclosures

EXHIBIT "C".

SUPPLEMENTAL AGREEMENT

This Supplemental Agreement dated this _____ day of _____ , 1973, by and between the parties hereto, hereby amends and extends the Sales Agreement dated _____ between Dairymen, Inc. and _____ .

Subparagraph (i) of Paragraph 3(A) of this Sales Agreement is hereby amended in the following particulars, to-wit:

> "The Class I price (including handling charge) effective for the period of July 1, 1973, through September 30, 1973, shall be $8.71 per hundred-weight for milk testing 3.5 percent butterfat"

All other language and provisions of said Agreement to the extent such are not in conflict with this Amendment shall remain in full force and effect until September 30, 1973.

The parties agree each with the other that in the event they negotiate a Sales Agreement setting forth the terms of trade for a period after September, 1973, that the Class I price (including handling charge) shall be not more than $8.86 per hundredweight for milk testing 3.5% butterfat for the period of October 1, 1973, through August 31, 1974; provided, however, that should the Minnesota-Wisconsin Series Price reach $6.12 per hundredweight, for milk testing 3.5% butterfat, then the Class I price under such Sales Agreement shall be re-negotiated by the parties hereto.

This agreement is not binding until it is signed by a duly authorized official of Buyer and approved and accepted by a duly authorized official of Seller and duplicate originals of the same delivered to each other.

DAIRYMEN, INC.
BY _____

_____
WITNESS

_____
BUYER'S NAME
BY _____

_____
WITNESS

EXHIBIT "D".

[Letterhead]

Dairymen, Inc.
GEORGIA DIVISION
PHONE (404) 482-7406
LOCATION: 6400 HILLANDALE ROAD, LITHONIA
MAILING ADDRESS: P.O. BOX 1287, DECATUR, GEORGIA 30031

July 12, 1973

TO: ALL HANDLERS IN GEORGIA FEDERAL ORDER NO. 7 MARKETING AREA AND OTHERS SUPPLIED BY DAIRYMEN, INC. — GEORGIA DIVISION

Gentlemen:

On June 5, 1973, we wrote you relative to the necessity for the amendment of our Sales Agreements in order to remain competitive in the procurement of milk supplies and to assure you and our other customers of an adequate supply of milk. In that letter, we pointed out that our dairymen were selling out of business at a rate of 1 percent per month and this rate of "sell out" of herds has increased progressively each month since March, and has drastically increased since the President's Price Freeze announcement of June 13, 1973.

The price increase planned for July 1, 1973 was not made effective because of the fact that the current freeze program did not permit a pass-through provision for raw agricultural products. We are hopeful for a revision of this price freeze program by the Cost of Living Council no later than August 12, 1973 — the end of the 60-day freeze period. Dairy farmers have been unable to pass through all of the higher feed and other production costs that have occurred since November, 1972. These farmers have had to absorb these higher costs for another thirty-one days in July after thay had expected minimal relief from the planned price increase.

The Minnesota-Wisconsin Series Price for the month of June, 1973, averaged $5.73 for milk containing 3.5 percent butterfat. Under the terms of our Sales Agreement — this Minnesota-Wisconsin Series Price level would trigger an increase of 15 cents per hundredweight, effective August 1, 1973. Due to the tremendous cost-price squeeze in which our dairy farmers find themselves (which has increased tremendously because protein supplements doubled in price since May 1, 1973, and are approximately four times as high as they were a year ago), and as we have discussed with you during the past month and a half, we feel that in order to assure you and our other customers an adequate supply of milk, it will be necessary to amend the Class I price provisions of our Agreement, effective August 1, 1973.

In order to give you as much notice as possible, this letter is consistent with our earlier letters and discussions regarding a price amendment to our present Sales Agreement effective August 1, 1973. Pursuant to the Supplemental Agreement, the price of milk received by you from Dairymen, Inc. on and after that date will be $8.86 per hundredweight, including the present eight cent service charge, for 3.5 percent butterfat milk utilized in Class I for milk sold in the Georgia Marketing Area; however, in no event shall the price of Class I milk be less than the applicable Federal Order Number 7 Class I price. All other provisions of the Sales Agreement heretofore executed between your company and Dairymen, Inc. will remain in effect through September 30, 1973.

Enclosed please find a copy of the Supplemental Agreement which confirms our discussions about this price increase. We will discuss this matter further with you and arrange to receive an executed copy of this Supplemental Agreement.

We appreciate your cooperation in helping to ameliorate a significant problem facing the entire dairy industry. Maintaining the basic productive capacity of the dairy industry is necessary for a progressive and viable industry, and is in the public interest.

Very truly yours,

DAIRYMEN, INC.

/s/ Frank H. McDowell
Frank H. McDowell, Manager
Georgia Division

FHMcD:bh
Enclosure

EXHIBIT "E".

SUPPLEMENTAL AGREEMENT

This Supplemental Agreement dated this _____ day of _____, 1973, by and between the parties hereto, hereby amends and extends the Sales Agreement between Dairymen, Inc. and the _____ _____, entered into on _____ .

Subparagraph (i) of paragraph 3(a) of this Sales Agreement is hereby amended in the following particulars, to-wit:

> "The Class I price effective for the period of August 1, 1973, through September 30, 1973, shall be $8.86 per hundredweight for milk testing 3.5 percent butterfat."

All other language and provisions of said Agreement to the extent such are not in conflict with this amendment shall remain in full force and effect until September 30, 1973.

The parties agree, each with the other, that in the event they negotiate a Sales Agreement setting forth the terms of trade for a period after September, 1973, that the Class I price shall be $8.86 per hundredweight (including an 8 cent per hundredweight service charge) for milk testing 3.5 percent butterfat for the period of October 1, 1973 through August 30, 1974, provided however, that should the Minnesota-Wisconsin Series Price reach $6.12 per hundredweight for milk testing 3.5 percent butterfat, then the Class I price under such Sales Agreement shall be renegotiated by the parties thereto.

SELLER - DAIRYMEN, INC.

By _____

_____

WITNESS

_____

BUYER

BY _____

_____

WITNESS

EXHIBIT "F".

Date: 8-1-73

Delivery accepted at Dairymen, Inc's pricing program currently in effect to competing handlers based on $8.86 per hundredweight for milk testing 3.5% butterfat used in Class I.

_____

Signature

REMARKS _____

_____

DIVISION COPY

GEORGIA, MUSCOGEE COUNTY.

Personally appeared before me, the undersigned attesting witness, John R. Kinnett, Jr. who, first being duly sworn, deposes and on oath says that the allegations of fact contained in the foregoing Complaint are true and correct.

This the 2nd day of August, 1973.

/s/ John R. Kinnett, Jr.
John R. Kinnett, Jr.

Sworn to and subscribed before me
this the *2nd* day of August, 1973:

/s/ Albert W. Stubbs
Notary Public, Muscogee County,
Georgia

I, ALBERT W. STUBBS, counsel for Kinnett Dairies, Inc., plaintiff, certify that no efforts have been made to give notice to defendant that plaintiff would seek a temporary restraining order. Notice should not be required because of the emergency created by the refusal of defendant, at approximately 6 P. M., August 1, 1973, to deliver milk to plaintiff as required by said Supplemental Agreement as amended, thereby making it impossible for plaintiff to supply its milk customers. The milk business is a daily business, requiring daily delivery to customers.

DATED August 2, 1973.

/s/ Albert W. Stubbs
Albert W. Stubbs

APPENDIX B.

Order to Show Cause and Temporary Restraining Order.

United States District Court, Middle District of Georgia, Columbus Division.

Kinnett Dairies, Inc., Plaintiff, v. Dairymen, Inc., Defendant. No. 1701.

Filed: August 2, 1973.

Upon the verified complaint and the certificate of Albert W. Stubbs, attorney for the plaintiff, attached to the complaint, it is

ORDERED that the defendant, Dairymen, Inc., show cause before this Court at Columbus, Georgia, on Tuesday, August 7, 1973, at 10:00 O'Clock A. M. Eastern Daylight Time, or as soon thereafter as counsel can be heard, why a preliminary injunction should not issue herein, enjoining the defendant, its officers, directors, employees, servants, agents, members, haulers, subsidiary corporations, independent contractors, successors, assigns, transferees, and all parties acting for, by, through or in concert with them, or any of them, from:

(a) Breaching said sales agreement between defendant and plaintiff, dated January 12, 1972, as amended in any manner or respect whatever at any time prior to October 1, 1973;

(b) charging, demanding from or accepting in payment more than $8.28 per hundredweight for milk testing 3.5% butterfat used in Class I for milk furnished or delivered by defendant to plaintiff under said sales agreement as amended;

(c) delivering, at any time prior to October 1, 1973, any less or different quantities of milk to plaintiff, or at different times or places, than the quantities and at the times

and places specified in or pursuant to the express terms of said sales agreement as amended; and it is further

ORDERED that this Order expire within 10 days after entry unless within such time the Order for good cause shown is extended for a like period, or unless the defendant consents that it may be extended for a longer period; and it is further

ORDERED that service of this Order to show cause together with a copy of the papers hereto attached on defendant Dairymen, Inc. on or before 6:00 O'Clock P. M. Eastern Daylight Time, Saturday, August 4, 1973, be deemed sufficient service; and it is further

ORDERED that the complaint, summons and this Order may be served by any sheriff of the State of Georgia, or his deputy, all such persons being hereby specially appointed by the Court for that purpose.

ISSUED at 1:45 P. M., Eastern Daylight Time, August 2, 1973.

/s/ J. Robert Elliott
United States District Judge